

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

Jeannette L. Nelson,
Complainant,

FINDINGS OF FACT,
CONCLUSIONS OF
LAW AND ORDER

vs.

Nekton, Inc.,
Respondent.

The above-entitled matter came on for hearing before Administrative Law Judge George A. Beck at 9:30 a.m. on October 24, 1995, at the Office of Administrative Hearings, 100 Washington Avenue South, in the city of Minneapolis, Minnesota. The hearing continued on November 3, 1995, and concluded that day. The record closed on the last day of hearing.

Howard L. Bolter, Esq., of the firm of Borkon, Ramstead, Mariani & Letourneau, Ltd., 485 North Star East, 608 Second Avenue South, Minneapolis, Minnesota 55402-1949, appeared on behalf of the Complainant, Jeannette Nelson. Louis M. Furlong, Jr., Esq., One Griggs Midway Building, 1821 University Avenue, St. Paul, Minnesota 55104, appeared representing the Respondent, Nekton, Inc.

NOTICE

Pursuant to Minn. Stat. § 363.071, subd. 2, this Order is the final decision in this case and under Minn. Stat. § 363.072, the Commissioner of the Department of Human Rights or any other person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. §§ 14.63 through 14.69.

STATEMENT OF ISSUE

The issues to be determined in this proceeding are whether or not the Respondent discriminated against the Complainant in the terms and conditions of her employment because of her sexual orientation, and if so, what damages or other relief, if any, the Complainant is entitled to receive.

Based upon all the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Jeannette L. Nelson graduated from the University of Wisconsin at Eau Claire with a Degree in Physical Education. After graduation, she worked as a Rehabilitation Counselor for two years. She also worked another two years in a program for the developmentally disabled. (Ex. A.)

2. Ms. Nelson is a lesbian who has resided with her partner for the past eight years.

3. In November of 1990, Ms. Nelson became a Residential Counselor at Imperial Court. Imperial Court is a residence for developmentally disabled adults located at 850 Imperial Court in Stillwater, Minnesota, which is owned by the Respondent. Imperial Court has three male residents and three female residents. When the facility is fully staffed, there are three staff people at the group home both during the week and on weekends. There were normally two primary Residential Counselors present. The Residential Counselors at the facility are supervised by a Residential Supervisor.

4. Ms. Nelson's first performance appraisal, as a Residential Counselor, was completed in May of 1991 for the period of November of 1990 through May of 1991. It indicates that Ms. Nelson met expectations for all of the applicable job duties. (Ex. 1.)

5. In March of 1992, Ms. Nelson was promoted to the position of Residential Supervisor at the Imperial Court group home. In this position, she supervised all of the staff employed at the group home. In turn, Ms. Nelson reported to a Project Coordinator at Respondent's St. Paul office. Each Project Coordinator is responsible for supervising several Nekton facilities.

6. The job description for Residential Supervisor indicates that the position is responsible, among other duties, for the scheduling of full and part-time counselors to assure an adequate staffing pattern, coordinating the efforts of all staff, and assuring that all full and part-time staff have completed orientation, along with other required in-service training. (Ex. B.)

7. Ms. Nelson's first written performance appraisal as a Residential Supervisor was completed by Project Coordinator Bobbi Hoppman in October of 1992. The appraisal indicates that Ms. Nelson met expectations for all relevant job duties. In regard to the supervision of staff, Ms. Hoppman commented that Ms. Nelson "is adjusting still in this area - continues to work with primary staff on the development of their skills, i.e. writing programs and quarterlies. Is adjusting to change from Counselor to Supervisor." (Ex. 2.)

8. In December of 1992, Project Coordinator Bobbi Hoppman sent Jeannette Nelson a Christmas card in which she wrote, "Thanks for all you do for the staff and residents at Imperial. Your efforts are much appreciated." (Ex. 4.)

9. Nekton's general policy in regard to supervision of staff is that the Supervisor needs to motivate the staff and needs to provide clear direction in support of the staff. The Respondent prefers that staff members be spoken to privately if there is a problem.

10. Ms. Nelson often had a brusque manner in dealing with staff. She sometimes raised her voice and would yell at staff members. She was not particularly skilled in complimenting employees or criticizing constructively. Her criticism was sometimes delivered in a manner which made staff uncertain whether she was kidding or reprimanding them. Criticism was sometimes delivered to staff members in front of a group rather than individually. She would sometimes say to staff members, "You must not want a job very bad." and then walk away. On one occasion in January or February of 1994, Ms. Nelson walked into the kitchen of the residence where staff members were present and told them to "Get off your fucking asses and help."

11. The staff at Imperial Court also believed that Ms. Nelson did not help train staff very much. The training of new staff on the weekends was done by co-workers rather than Ms. Nelson. Staff members had difficulty reaching Ms. Nelson on weekends although she was supposed to be available. The staff at Imperial Court believed that the high turnover was due to a lack of training.

12. A written performance appraisal of Ms. Nelson for 1993 was completed in November of that year. (Ex. 3.) It was completed by Supervisor Lynda Anderson. It again indicates that Ms. Nelson meets expectations on all relevant job duties. In the comment section, Ms. Anderson observed that "Jeannette has had a difficult year at Imperial Court due to severe shortages in staff. Despite this, Jeannette has kept the house together, ensured everybody's needs have been met, and has continued to meet all job requirements in a timely fashion. . . . Jeannette has grown in supervisory skills in the past year. She has made appointments with each staff person to discuss their job performance and expectations with them. Jeannette has had to work many weekends and other odd hours and has handled all these difficulties with good humor." (Ex. 3.)

13. Turnover of staff at Imperial Court had been a problem during 1993. In the spring of 1994, however, the problem became worse and the staff was reduced. Project Coordinator Lynda Anderson scheduled a meeting at Imperial Court for the staff at which the atmosphere in the residence was discussed. Each staff member was given a card to be returned to Ms. Anderson with their anonymous comments on what problems they believed existed at the residence. The cards that were returned to Ms. Anderson indicated that the staff did not feel that they were respected by Ms. Nelson. One staff member stated that he or she had been sworn at by Ms. Nelson. Ms. Anderson then communicated these complaints to Ms. Nelson; however, Ms. Nelson denied that they were accurate.

14. Within the next couple of weeks, another Project Coordinator at Nekton received a telephone call from a staff member at Imperial Court who stated that she was quitting because of the way she was being treated by Ms. Nelson. She complained of no training or support on weekends. The Project Coordinator relayed these comments to Lynda Anderson. After talking to other Project Coordinators and to some staff members at Nekton, Ms. Anderson decided that a new Supervisor was needed at Imperial Court. At that time, the staff was down to five or six.

15. Ms. Anderson then met with Ms. Nelson on June 4, 1994, and advised her that she was being let go as a Supervisor. Ms. Anderson mentioned the staff member at Imperial Court who was quitting. Ms. Nelson was shocked and upset. She asked

Ms. Anderson why this was happening and Ms. Anderson said that she had been advised not to tell her and stated that "Let's just say it's high turnover." Ms. Anderson advised Ms. Nelson to contact Project Coordinator Bobbi Hoppman about another position with Nekton. Nekton offered Ms. Nelson a position as a Residential Counselor at another group home at a salary which was \$1.91 per hour lower than her salary as a Supervisor at Imperial Court. When she left Imperial Court, Ms. Nelson was making \$10.91 per hour.

16. Ms. Nelson wrote to Ms. Anderson in a letter dated June 6, 1994, and requested to know the exact reason for her termination. (Ex. 5.) Ms. Anderson replied in a letter dated June 8, 1994, and stated that the reason Ms. Nelson was removed from her supervisory position was the high turnover rate in the past year. (Ex. 6.)

17. Nekton hired a new Residential Supervisor at Imperial Court in July of 1994. This person was not gay or lesbian.

18. The Respondent has adopted a written policy statement on equal employment opportunity. It states that the Respondent will not discriminate against any employee because of sexual orientation. It provides that if any employee believes he or she has been discriminated against, they should contact the Manager of the Equal Employment Opportunity Program. (Ex. C.)

19. Ms. Nelson did not tell anyone at Imperial Court that she is a lesbian except for her partner. The staff at Imperial Court was generally unaware that Ms. Nelson was a lesbian. On some occasions, however, there was a discussion of the fact that Ms. Nelson and her partner, who also worked at Imperial Court, lived together.

20. One of the staff members at Imperial Court was openly gay. The Respondent has employed gays or lesbians as Project Coordinators and as management personnel. Ms. Anderson twice offered a Residential Supervisor position to a Resident Counselor who was openly lesbian. Nekton has generally been a hospitable place for gays and lesbians to work.

21. Ms. Nelson was never asked by anyone at Nekton at any point to disclose her sexual orientation. She never made any complaint to the Respondent about discrimination based on her sexual orientation.

22. Ms. Nelson declined to take the demotion offered by the Respondent and found employment at another group home after a job search of about six weeks. Her new salary was less than she was making at Imperial Court.

23. Ms. Nelson was not specifically advised prior to her termination that high turnover at the Imperial Court residence was a problem she needed to attend to. Neither was she advised prior to her discussion with Ms. Anderson in the spring of 1994 about swearing or harsh treatment of staff.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge has jurisdiction in this matter under Minn. Stat. §§ 14.50 and 363.071.

2. The Notice of and Order for Hearing in this matter was proper and fulfilled all relevant substantive and procedural requirements of law or rule.

3. At the relevant times, Respondent was an employer as defined in Minn. Stat. § 363.071, subd. 17, and the Complainant was an employee within the meaning of Minn. Stat. § 363.01, subd. 16.

4. Under Minn. Stat. § 363.03, subd. 1(2)(c), it is an unlawful employment practice for an employer to discriminate against a person because of sexual orientation with respect to the terms, conditions or privileges of employment.

5. The Complainant has proved a *prima facie* case of discrimination on the grounds of sexual orientation.

6. The Respondent has advanced legitimate, nondiscriminatory reasons for terminating or demoting the Complainant.

7. The Complainant has failed to prove by a preponderance of the evidence that the reasons advanced by the Respondent are mere pretext.

8. The Complainant has failed to prove by a preponderance of the evidence that the Respondent discriminated against her on the grounds of sexual orientation when it discharged or demoted her from her position as Residential Supervisor.

9. The reasons for the above Conclusions of Law are set out in the Memorandum which follows and which is incorporated into these Conclusions of Law by reference.

10. Any Findings of Fact which is more appropriately classified as a Conclusion of Law is hereby adopted as such.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED that this matter is DISMISSED with prejudice.

Dated this 14th of November, 1995

/s/

GEORGE A. BECK
Administrative Law Judge

Reported: Tape recorded.

Five tapes, no transcript prepared.

MEMORANDUM

The Minnesota Human Rights Act provides that it is an unfair employment practice for an employer to discharge or demote a person because of his or her sexual orientation. Discrimination charges brought under the Minnesota Human Rights Act are considered under the analysis first set forth in *McDonnell-Douglas Corp. v. Greene*, 411 U.S. 792, 802-803 (1973). This analysis has been adopted by the Minnesota Supreme Court. *Danz v. Jones*, 263 N.W.2d 395, 399 (Minn. 1978); *Sigurdson v. Isanti County*, 386 N.W.2d 715, 719 (Minn. 1986). Under this case law, the complainant must first establish a *prima facie* case of disparate treatment based upon a statutorily prohibited discriminatory factor. Once a *prima facie* case is established, a presumption arises that the respondent unlawfully discriminated against the complainant. The burden of producing evidence then shifts to the respondent, who is required to articulate a legitimate, nondiscriminatory reason for its treatment of the complainant. If the respondent establishes a legitimate, nondiscriminatory reason, the burden of production shifts back to the complainant to demonstrate that the respondent's reasons were pretextual. *McDonnell-Douglas*, 411 U.S. 802-04; *Hubbard v. United Press International, Inc.*, 330 N.W.2d 428 (Minn. 1983). The burden of proof at all times remains with the complainant. *Lamb v. Village of Bagley*, 310 N.W.2d 508, 510 (Minn. 1981); *St. Mary Honor Center v. Hicks*, ___ U.S. ___, 113 S. Ct. 2742, 2753-54 (1993).

The specific elements of a *prima facie* case are modified to fit varying factual patterns. *Hubbard, supra*, 330 N.W.2d at 442; *Potter v. LaSalle Court Sports & Health Club*, 384 N.W.2d 873, 875 (Minn. 1986). Applying this case law to a case involving an allegation of discrimination on the basis of sexual orientation, the Complainant must prove the following elements to demonstrate a *prima facie* case: (1) that she is lesbian; (2) that she was discharged or demoted; (3) that she was qualified for the position from which she was discharged or demoted; and (4) that the employer assigned a person of a different sexual orientation to the Complainant's former position.

The Complainant has established a *prima facie* case of discrimination. There is no dispute that she is a member of a protected group by virtue of her sexual orientation being lesbian, and that she was replaced as a Residential Supervisor at Imperial Court by a heterosexual. Although the Respondent sought to characterize the action taken with respect to the Complainant as nondisciplinary, it is clear that she suffered an adverse employment action by being removed from her position as Residential Supervisor. The Respondent did offer her a position as a Residential Counselor at a lower rate of pay. This would have constituted a demotion which is also an adverse employment action.

The Respondent did contest whether or not the Complainant was qualified for her position. Nekton suggested that Ms. Nelson's deficiencies as a Supervisor indicated that she was not qualified for that position. However, the fact that the Complainant was employed for two years as a Supervisor with satisfactory performance reviews is sufficient to demonstrate that she is qualified for the purposes of the *prima facie* test. The case law indicates that the factor of whether the Complainant is "qualified", which was originally formulated to apply to a hiring situation, is not meant to preclude the

employer from having to explain its reasons for adverse action where the employee has performed the job for a substantial period of time with satisfactory results.

The Respondent established legitimate, nondiscriminatory reasons for discharging the Complainant, namely, poor supervisory skills and staff turnover. The record demonstrates that in the spring of 1994, the turnover of staff had become more acute. The Project Coordinator responsible for the Complainant's facility held a staff meeting at the facility to discuss problems. The atmosphere in the residence was discussed during this meeting and the staff was issued cards that could be returned to the Project Coordinator anonymously to indicate what problems existed. The feedback that the Project Coordinator received from staff was to the effect that they had been sworn at by Ms. Nelson and were not respected by her. The Findings of Fact detail incidents concerning yelling and swearing by Ms. Nelson towards staff as well as other poor supervisory skills. There is no indication that the staff at Imperial Court reported any of these matters to Ms. Nelson's supervisor prior to the spring of 1994. There is also no indication that any complaints were made about this behavior to Ms. Nelson by the staff at Imperial Court or her supervisor. However, in the spring of 1994, Ms. Anderson did report the results from the anonymous cards to Ms. Nelson who then denied that any such problems existed. Ms. Anderson assumed that if a problem existed, Ms. Nelson would then correct it.

The event which precipitated Ms Nelson's discharge was a Residence Counselor contacting a Project Coordinator, Sandra Wessman, and stating that she was resigning because of harsh treatment by Ms. Nelson. This occurred a couple of weeks after Ms. Anderson talked to Ms. Nelson. Ms. Anderson then talked to other staff members and her peers, the other Project Coordinators in the office, and determined that they needed to make a change. Ms. Nelson was then advised that she could not continue as Supervisor due to "the high turnover of staff".

The Complainant sought to show that the reason advanced by the employer was a pretext by arguing that the reason was not believable since it hadn't been communicated to the Complainant prior to the spring of 1994. It is not reflected in her written performance reviews. The Complainant suggests that the testimony by employees concerning her supervisory skills were essentially trumped-up charges by employees who did not like her sexual orientation. However, the Complainant's inadequacies as a Supervisor were testified to by several employees. The evidence indicates that she commonly yelled at the staff and on at least one occasion, swore at them. This testimony was credible. The staff at Imperial Court believes that this harsh treatment, together with the Complainant's failure to participate in training new staff on weekends, contributed to the high turnover of staff at the facility. The fact that supervisors were not aware of the extent of the problems until the spring of 1994 doesn't preclude dealing with the problem once it became obvious.

The Complainant points to an ambiguous statement by her Supervisor to the effect of "I was advised to tell you" that the reason for your termination is high turnover. It appears that the reasons of harsh treatment or swearing or failure to train were not specifically mentioned to the Complainant when she was terminated. However, the stated reason of high turnover is rationally related to the performance problems which

Ms. Anderson uncovered in the spring of 1994. It seems clear that the Project Coordinators believed that Ms. Nelson's supervisory skills left something to be desired and believed that they could improve the situation at Imperial Court by making a change. The ambiguous statement by Ms. Anderson led Ms. Nelson to conclude that there were unstated reasons for her removal. This was likely the case. The record indicates it is more likely than not that the unstated reasons were her supervisory skills rather than her sexual orientation.

The Complainant has failed to prove by a preponderance of the evidence that she was discriminated against based upon her sexual orientation. There is no direct evidence of discrimination in this case. Testimony concerning a conversation about the Complainant and her partner living together was ambiguous and was apparently participated in by a gay employee of the group home. The Respondent has employed a number of gays and lesbians in both Residential Counselor positions as well as Management positions. Although the Complainant points out that this does not necessarily mean it did not discriminate in her case, it does tend to indicate that the employer does not seek to exclude people on the basis of their sexual orientation since at least some of these employees were openly gay or lesbian.

There is no evidence of other complaints by gays or lesbians relating to the Respondent. The Respondent has a clear complaint policy for discrimination which the Complainant did not utilize. Additionally, the record indicates that no one at Imperial Court or Nekton was specifically aware that Ms. Nelson was lesbian. She had not announced this in the workplace and only one employee who testified even thought that she might be lesbian. Finally, the fact that the employer offered Ms. Nelson another position as a Residence Counselor indicates that her sexual orientation was not the basis for relieving her of her supervisory position. Although the position offered to the Complainant was at a lesser hourly rate, it also allowed overtime which her supervisory position did not. The employer has advanced and proved a legitimate reason for its action. The Complainant has not shown that sexual orientation was the reason for her removal from the position of Residential Supervisor and, therefore, this case must be dismissed.

G.A.B.